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Supreme Court, U.S.
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No. _____

# In the Supreme Court of the United States

**DAVID HARPER,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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45 pp

## QUESTION PRESENTED

Is it not a violation of a parties' right to be free from the loss of one's personal liberty for crimes committed without first submitting to the unanimous verdict of an impartial jury in accordance with Article [V] and Article [VI], otherwise known as the Fifth and Sixth Amendments to the Constitution of the United States?

## PARTIES TO THE PROCEEDINGS

**PETITIONER**

DAVID HARPER

**RESPONDENT**

UNITED STATES OF AMERICA

## TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITIONAL PROVISION INVOLVED.....1

STATEMENT OF THE CASE.....1,2

**A. Fifth and Sixth Amendments**.....2

**B. The Proceedings Below**.....2,3

REASONS FOR GRANTING THE WRIT.....3

CONCLUSION.....3

APPENDIX

**Appendix A**
Court of Appeals Opinion, 4/6/01.....1a

**Appendix B**
District Court Judgment, 10/25/99.....24a

## TABLE OF AUTHORITIES

Constitution of the United States.....1,2,3,4
United States Code Annotated,
Title 28 § 1254 et. seq. .....1
United States Code Annotated,
Title 18 § 1512 et. seq.....3

David Harper respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit and the District Court.

## OPINIONS BELOW

The opinion of the Court of Appeals is reproduced and is found in Appendix A and the judgment of the District Court is also reproduced and can be found in Appendix B.

## JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on April 6, 2001. This Court has jurisdiction under 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth and Sixth Amendments to the United States Constitution provides, among other things, that no person shall be deprived of life, liberty, or property, without due process of law and that the accused shall enjoy the right of an impartial jury. U.S. Constitution Amendments V and VI.

## STATEMENT OF THE CASE

This case arises from a drug case involving a conspiracy to distribute marijuana where the petitioner entered a guilty plea and was subsequently sentenced

to 168 months. The petitioner received a greater sentence because among other things he was held liable to obstruction of justice for which he was never charged, indicted nor given his constitutional right to due process and a trial by an impartial jury, in accordance with the Fifth and Sixth Amendments to the Constitution.

**A. Fifth and Sixth Amendments**

The trial court enhanced petitioner's sentence based upon a letter written by the petitioner to a co-defendant which was decided by the Court and found to be obstruction of justice. Whereupon petitioner's sentence was enhanced essentially upon the trial court's finding by the preponderance of the evidence that petitioner was guilty of a crime for which he was never indicted.

Petitioner asserts that obstruction of justice is an indictable offense codified as Title 18 § 1512 et seq. in the United States Code Annotated, and that a portion of his sentence represents loss of his liberty based solely upon the findings of the court without first being officially charged with said offense and afforded due process of law and, or a trial by an impartial jury all of which is in violation of the Fifth and Sixth Amendment to the Constitution.

**B. The Proceedings Below**

The petitioner also submits that the issue of the establishment of obstruction of justice by the district court was raised on appeal, however, the court of

appeals did not sufficiently deal with this very important constitutional issue.

## REASONS FOR GRANTING THE WRIT

I. For some reason the indictable offense of obstruction of justice has found its way into the sentencing guidelines and is being used as an enhancing factor when the trial court finds that it is appropriate to do so. Petitioner submits that the safe guards in our constitution pursuant to the Fifth and Sixth Amendments require that due process of law be followed and that the accused be found guilty by an impartial jury absent a guilty plea. To find one guilty of an indictable offense by the preponderance of the evidence appears to be unconstitutional.

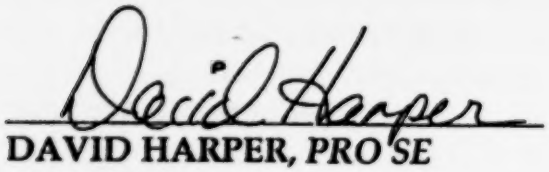
II. Under what conditions or circumstances may the trial court find one accused of an indictable offense guilty by the preponderance of the evidence? Must not each and every element of the offense be proved beyond a reasonable doubt? There are important questions that needs to be addressed by this Court.

III. The Court of Appeals did not address this question or issue sufficiently, although the court did sufficiently address the other issue.

## CONCLUSION

The petition for a writ of certiorari should be granted.

**RESPECTFULLY SUBMITTED:**



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# APPENDIX

**APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED APRIL 6, 2001**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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|---|---|---|
| UNITED STATES OF AMERCIA<br>*Plaintiff-Appellee,* | ) | |
| v. | ) | Nos. 99-6485/6543 |
| DAVID HARPER (99-6485) and<br>JUAN GARCIA (99-6543),<br>*Defendants-Appellants.* | ) | |

Appeal from the United States District Court
For the Eastern District of Tennessee at Knoxville.
No. 99-00006-Curtis L. Collier, District Judge.

Argued (99-6485) and
Submitted (99-6543): December 1, 2000

Decided and Filed: April 6, 2001

Before: DAUGHTREY and MOORE, Circuit Judges;
CARR, District Judge.

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## COUNSEL

**ARGUED:** Aubrey L. Harper, HARPER, TOLLISON & BURKE, McMinnville, Tennessee, for Appellant. Hugh Ward, Jr., ASSISTANT UNITED STATES ATTORNEY, Knoxville, Tennessee, for Appellee. ON BRIEF: Aubrey L. Harper, HARPER, TOLLISON & BURKE, McMinnville, Tennessee, James H. Varner, Jr.,

ESHBAUGH, SIMPSON, VARNER & WATERS, Knoxville, Tennessee, for Appellants. Hugh B. Ward, Jr., ASSISTANT UNITED STATES ATTORNEY, Knoxville, Tennessee, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. David Harper ("Harper") and Juan Garcia ("Garcia"), co-defendants, appeal their sentences imposed by the district court following their convictions, Harper for a drug offense in violation of 21 U.S.C. § 846, Garcia for drug offenses in violation of 21 U.S.C. §§ 841(a)(1) and 846 and witness tampering in violation of 18 U.S.C. § 1512(b)(1). After they were arrested and held in custody but prior to trial, each wrote a letter urging a co-defendant to cover up evidence of their offenses. Both Harper and Garcia subsequently pleaded guilty, and their sentences were adjusted upward under United States Sentencing Guidelines ("Guidelines") § 3C 1.1 for having obstructed justice. Neither was granted a downward adjustment under Guidelines § 3El.1 for acceptance of responsibility. Harper and Garcia appeal their sentences, arguing that they both present "extraordinary" cases which merit a downward adjustment for acceptance of responsibility despite an upward adjustment for obstruction of, justice. Harper's counsel also filed a letter with this court seeing to challenge, at oral argument, his sentence as judgment of the district court.

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*The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).[1] For the following reasons, we **AFFIRM** the judgment of the district court.

## I. BACKGROUND

On January 15, 1999, Harper and Garcia, along with several other co-defendants, were arrested while transporting approximately 1,100 pounds of marijuana from Chattanooga to Sweetwater, Tennessee. Both defendants were initially indicted on January 20, 1999. On February 25, 1999, following an indictment on two counts of drug offenses, Harper wrote the following letter from prison to a codefendant, Adan Rocha, asking him to deny Harper's involvement in the crime:

Adan,

How are things - I hear you plea bargained - is it true - They called me down there to the procicutor's [sic] office and wanted me to tell them on everybody - but as you know I didn't know anything about that stuff being in the freight - you know this - and I'm hoping you will go to court and be a witness for me - telling that I didn't know about the pot being there - all I want you to do is tell the truth about Vic telling me that he was going to set me up in the mexican import business - and that

[1]Garcia also sought, by letter to this court, to raise several issues, including an Apprendi argument, for our consideration subsequent to oral argument in this case. Although Garcia is represented by counsel, his counsel did not bring these issues to our attention. Because we lack the benefit of briefing or oral argument on these issues, and because they were not raised by Garcia's counsel, we decline to address Garcia's new issues in this direct appeal.

you called me and I came to Larado to meet with him and you and he tricked me into picking up the freight with the stuff in it -I think everyone still has a chance to beat it, in a hearing to suppress the evidence or a hearing to dismiss the charges. You should have waited until after these hearings before you plea bargained, if in fact you did.
Write me a letter and let me know if what I hear is true; and what is really going on. Tell you [sic] lawyer to get in touch with my lawyer and let him know.
I hope and pray that you will do the right think [sic] about this because you know that you got me into all this mess.

May God bless & keep you strong.

Your friend David.

J.A. at 157-58 (Presentence Report).

On March 31, 1999, while in prison awaiting trial, Garcia authored a letter to his nephew, also an indicted co-defendant, asking him to assist in Garcia's defense:

If they ask you if you know a Villa you say no; that is all you are going to answer ok. Then you want to say that you don't know anything about what is in the truck. Only say that you have nothing to do with the matter and to let you go. Otherwise if you say that you know them, they will keep you because then you will

enter into a conspiracy and then you can forget that you will leave soon. Just remember, you do not know Villa. That is all they want to know from you, they don't want to let you go. They only want to know if you know him to make you like them better, just remember you don't know him. Ok.
Tio [Uncle]

J.A. at 137 (Presentence Report). This letter did not reach its intended recipient.

Subsequent to their obstructive behavior, Harper and Garcia were charged in a second superseding indictment with four counts: (1) conspiracy to distribute and possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846; (2) possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; and (3-4) witness tampering, in violation of 18 U.S.C. § 1512(b)(1) (one count each as to Harper and Garcia). On June 10, 1999, Harper agreed to plead guilty to count one pursuant to a plea agreement executed with the government.[2] In exchange for the plea, the government agreed not to oppose Harper's request for a three-level downward adjustment for acceptance of responsibility if Harper fulfilled his obligations under the agreement and the Probation Office recommended a reduction. The agreement also stated that, by pleading guilty, Harper was exposing himself to a mandatory minimum

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[2]As part of Harper's plea agreement, the government agreed to dismiss counts two and three at the sentencing hearing.

sentence of ten years to life imprisonment. As support for the plea agreement, Harper stipulated to a "factual basis" which noted the specific amount of marijuana, 1108 pounds, for which he assumed responsibility. On July 13, 1999, the morning of trial, Garcia pleaded guilty to counts one, two, and four of the indictment without the benefit of a plea agreement.

In a presentence report prepared by the probation office, Harper's total offense level was set at 33 and his criminal history category at level III. In a separate presentence report, Garcia's total offense level was calculated to be 37 and his criminal history category was set at level VI. The reports for both defendants recommended a two-level upward adjustment for obstruction of justice based on the letters sent from prison. Neither report recommended any adjustment for acceptance of responsibility, although both reports noted that "the Court may consider the timing of the obstruction and the fact that the obstructive behavior did not result in any significant problems in the case. Defense counsel may be able to convince the Court that this is an extraordinary set of circumstances where both adjustments could apply." J.A. at 138, 158.

Garcia and Harper objected to their presentence reports and argued that they deserved a downward adjustment for acceptance of responsibility because their obstructive behavior occurred early in the government's investigation, their behavior did not have any effect on the government's case, and they

subsequently pleaded guilty. Garcia made the further argument that he began to accept responsibility after his attempt to send the letter to his nephew and that his acceptance therefore encompassed "the fact of the prior obstructive behavior." J.A. at 92 (Objections to Presentence Report).

At the sentencing hearing, held on September 28, 1999, the district court rejected the defendants' objections and adopted the sentencing recommendations in the respective presentence reports.

The district court judge stated that he found nothing "extraordinary" in the defendants' cases because "in most cases where there is [an] obstruction [adjustment], it's because the person has been discovered, it's been detected, and the obstructive conduct has not had a major effect upon the prosecution." J.A. at 114 (Sentencing Hr'g). Furthermore, according to the district court, "most cases result in guilty pleas, at some point after the unsuccessful obstructive conduct took place." J.A. at 114. The district court then sentenced Harper to 168 months in prison, a term of supervised release, and a special assessment of $100. After granting the government's motion for a reduction of sentence as to Garcia for substantial assistance pursuant to § 5K 1.1, the district court sentenced Garcia to 300 months in prison, a term of supervised release, and a special assessment of $100.

Both defendants appeal their sentences and the

district court's refusal to grant them a downward adjustment for acceptance of responsibility. Garcia claims that the district court erred because it failed to consider that his obstruction occurred early in the federal investigation; he did not repeat his efforts to contact his nephew; and he actively cooperated with the government after pleading guilty by helping to identify additional individuals involved in the drug operation. Harper contends that the district court erred because it failed to consider that he could have sufficiently accepted responsibility in the interim three-and-a-Half months between the time he wrote the obstructive letter and the date he signed his plea agreement. Harper also argues that his sentence is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because neither the amount of drugs for which he was sentenced nor the facts establishing the obstruction of justice adjustment were proved by the government beyond a reasonable doubt.

The government counters that the district court considered the facts and properly determined that there was nothing "extraordinary" about either case such that it would merit both the upward adjustment for obstruction of justice under the Guidelines and a downward adjustment for acceptance of responsibility. The government also disputes the applicability of *Apprendi* to Harper's sentence.

## II. ANALYSIS

### A. Standard of review

We usually defer to a district court's factual findings regarding acceptance of responsibility and will reverse the district court only if its findings are clearly erroneous. *United States v. Tilford*, 224 F.3d 865, 867 (6th Cir. 2000); *United States v. Surratt*, 87 F.3d 814, 821 (6th Cir. 1996). When the facts are undisputed, as in this case, the question whether the district court appropriately applied the Guidelines to a particular set of facts is a question of law that we review de novo. *Tilford*, 224 F.3d at 867; *United States v. Childers*, 86 F.3d 562, 563 (6th Cir. 1996). We write today to clarify that the question whether undisputed facts constitute an "extraordinary" case that warrants an adjustment for acceptance of responsibility despite charges of obstruction of justice under § 3131.1 of the Sentencing Guidelines is a question of law that we review de novo. The defendant has the burden to demonstrate acceptance of responsibility by a preponderance of the evidence. *Surratt*, 87 F.3d at 821.

### B. Timing of Acceptance of Responsibility

According to the Sentencing Guidelines, a district court may grant a defendant a two-level downward adjustment to his base offense level if the defendant "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). A defendant may be

eligible for an additional one-level adjustment if the "defendant has assisted authorities in the investigation or prosecution of his own misconduct" and his offense level, prior to the application of § 3EL1(a), was greater than level 16. U.S.S.G. § 3E1.1(b). Application note 4 to this section states that conduct resulting in an enhancement under § 3CL1 for obstruction of justice[3] "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3CL1 and 3131.1 may apply." U.S.S.G. § 3C1.1, comment. (n.4). We are asked to review the district court's determination that the defendants did not present an "extraordinary" case such that they deserved the downward adjustment for acceptance of responsibility despite their obstructive conduct.

Recently, in *United States v. Jeter*, 191 F.3d 637 (6th Cir. 1999), we clarified when we begin to examine the defendant's conduct for evidence that he has accepted responsibility for his offense. We noted in *Jeter* that while "district courts have discretion in determining the

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3The district court adjusted the defendants' sentences upward for obstruction of justice pursuant to Sentencing Guideline ' 3C1.1, which provides that the district court may increase the offense level by 2 levels if:

A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense. The applicability of this adjustment is not contested on appeal.

time period for acceptance of responsibility, we do not believe they have unbridled discretion." *Jeter*, 191 F.3d at 640. Thus, we determined that the district court could not use Jeter's "preindictment state crimes as a basis for denying him a reduction for acceptance of responsibility on the federal charges." *Id.* at 639. We held, as a matter of law, that "the defendant must be on notice that the federal government has an interest in his or her affairs before § 3E1.1 comes into play." *Id.* at 639-40. In *United States v. Tilford*, we refined Jeter's holding and concluded that, despite the fact that Tilford was alerted to IRS agents' interest in his affairs in 1993 when the agents informed him they were investigating his tax returns, the relevant time period for measuring Tilford's acceptance of responsibility began with the entry of Tilford's guilty plea on February 26, 1998, which was, importantly, the (late of his indictment. *Tilford*, 224 F.3d at 868.

Conversely, in *United States v. Roberts*, - F.3d - , 2001 WL 220003, *5 (6th Cir. March 6, 2001), a panel of this court upheld a district court's upward adjustment for obstruction of justice based on a defendant's obstructive behavior which occurred prior to his federal indictment. In *Roberts*, the defendant was indicted in state court in January 1997 for felony rape and kidnapping. Roberts subsequently escaped from state custody where he was being held for the state offenses. He was then, on June 18, 1998, indicted by a federal grand jury for the same underlying conduct that led to his state indictment. Roberts challenged the upward

adjustment of his sentence under § 3C1.1, arguing that the Guideline did not apply because the obstructive behavior did not occur "during the course of the investigation, prosecution, or sentencing of the *instant offense of conviction.*" U.S.S.G. § 3C1.1 (emphasis added). Affirming the district court's adjustment of the defendant's sentence, the *Roberts* court reasoned that the defendant's obstruction as to his state charges was connected to the "instant offense of conviction" in federal court because "both sets of charges, and the obstruction activity, were related to the same underlying activity." *Roberts*, 2001 WL 220003, *5. The *Roberts* court also affirmed the district court's denial of the defendant's request for a downward adjustment for acceptance of responsibility, concluding that there was nothing extraordinary about the defendant's case. *See id.* at *6.

As *Tilford* and *Jeter* make clear, a district court may at least consider the defendant's behavior following his initial indictment in federal court for purposes of measuring whether the defendant has accepted responsibility because the a defendant is certainly "on notice that the federal government has an interest in his . . . affairs" at the time of indictment. *Jeter*, 191 F.3d at 639-40. *Roberts*, however, teaches that obstructive behavior can occur prior to the moment at which courts may consider whether the defendant's conduct conforms with his acceptance of responsibility. Thus, a district court's evaluation whether the defendant has accepted responsibility is distinct from the court's

determination whether the defendant has obstructed justice.

In this case, we believe the district court properly began evaluating the defendants' conduct for purposes of the § 3131.1 adjustment as of the time the defendants were first indicted on January 20, 1999. We reject Garcia's argument that we begin to measure acceptance of responsibility subsequent to the date of his attempted obstruction of justice. It is clear that Garcia knew of the government's interest in his criminal activity, not simply after he wrote the obstructive letter at the end of March, but, at the latest, when he was first indicted in January 1999. Therefore, the district court did not err by considering all post-indictment behavior when assessing whether to grant a downward adjustment under § 3131.1

**C. Application of Sentencing Guidelines**

At the sentencing hearing, the district court attempted to discern what was "extraordinary" about each case. When posed with the direct question, Garcia's lawyer stated that "the factual circumstances are what's extraordinary about this case." J.A. at 106 (Sentencing Hr'g). Elaborating, he explained that he believed Garcia's case was extraordinary because Garcia's obstructive conduct occurred shortly after his arrest and had no effect on the government's case. He further stated that Garcia waited to plead guilty until the morning of trial due to his inexperience with the

federal court system and his shock at the number of years of imprisonment that he faced. Finally the lawyer stated: "I'm not very often faced with this kind of circumstance, so I'm not sure that I can say to the Court what is extraordinary." J.A. at 109.

Harper's lawyer stated that his client's case was extraordinary because, in the three-and-a-half months between the time Harper sent the obstructive letter and the date of his plea, he accepted responsibility. Conceding that his client had not accepted responsibility as of the time the letter was sent, Harper's counsel argued that his client sufficiently accepted responsibility after the letter was sent to merit the downward adjustment.

The government informed tile district court that it did not oppose either defendant's request for a downward adjustment. When pressed on the question whether either defendant's case was extraordinary, however, tile government stated, "to be honest . . . , I can't tell you what an extraordinary circumstance would be. I can tell you, to be very forthright with the Court, these are not extraordinary circumstances." J.A. at 113.

Declining to grant the defendants their proposed downward adjustment, the district court stated that, in its experience, those defendants charged with obstruction of justice had attempted and failed in their efforts at obstruction. In most of those cases, according to the district court, "after the unsuccessful obstructive

conduct took place, there would be a guilty plea . . . ." J.A. at 114-15. Based on its experience, the district court concluded there was nothing extraordinary about the set of facts in either Harper or Garcia's case; indeed, according to the district court, "this is pretty typical of what you would expect to see in cases where there is an obstruction of justice adjustment." J.A. at 115-16.

We agree with the district court that it is the ordinary case in which a defendant pleads guilty after his attempts to obstruct justice are thwarted. We do not find persuasive either Harper or Garcia's argument that his guilty plea is sufficient evidence that he accepted responsibility. According to § 3E1.1's application note 3, "(e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction . . . will constitute significant evidence of acceptance of responsibility . . . ." U.S.S.G. § 3E1.1, comment. (n.3). This evidence may, however, "be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." *Id.* Moreover, the note states that "a defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right." 1d. We believe it is the "extraordinary" case in which the defendant's obstructive conduct does not "outweigh[]" the defendant's acceptance of responsibility. Thus, we require something more, as a matter of law, than a guilty plea after an attempt to obstruct justice to demonstrate that the defendant's case is "extraordinary."

It is, moreover, the defendant's burden to demonstrate that his case is "extraordinary" such that he deserves the downward adjustment. This burden is not, however, insurmountable. For example, if a defendant awaiting trial escapes from custody but then immediately turns himself into authorities, this could constitute an "extraordinary" case in which a defendant accepts responsibility subsequent to an attempt to obstruct justice. Similarly, had either defendant in this case immediately confessed after writing his obstructive letter and then offered to plead guilty, this would have been extremely persuasive evidence that his case was "extraordinary" such that he merited the downward adjustment under § 3E1.1 despite his obstructive behavior.

We note that a defendant need not have evidence of other individuals' participation in criminal activity in order to establish that his case is extraordinary. Such a standard would impose too great a burden on a defendant. Should a defendant provide the government with evidence of other individuals' criminal conduct, he should, upon a motion by the government, appropriately be considered a candidate for a downward departure for substantial assistance to authorities under § 5K1.1. See U.S.S.G. § 5K1.1 (noting that court may depart from guidelines, upon motion by government, when defendant provides "substantial assistance in the investigation or prosecution of *another* person who has committed an offense") (emphasis

added). In order to demonstrate to the court that his case is extraordinary under § 3E 1. 1, in contrast, the defendant must cooperate as to himself, not as to others. See U.S.S.G. § 3E1.1(a) (permitting two level adjustment if "defendant clearly demonstrates acceptance of responsibility *for his offense*") (emphasis added); *see also* § 3E1.1(b) (permitting additional one level adjustment if "defendant has assisted authorities in the investigation or prosecution of *his own misconduct*") (emphasis added).

Neither defendant presented the district court with evidence of anything other than the fact that the attempted obstruction failed and the defendant later entered a guilty plea, Garcia's on the morning of trial[4]. Therefore, we cannot say that, as a matter of law, the district court erred by concluding that neither Harper nor Garcia was entitled to a downward adjustment for acceptance of responsibility given his obstructive conduct.

**D. Harper's *Apprendi* Challenge**

Harper's counsel asserted two additional issues at oral argument: first, that Harper's sentence is unconstitutional pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the amount of drugs to which Harper stipulated in the factual basis supporting his

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[4]Garcia did then provide the government with information for further prosecutions, but his sentence reflected his assistance in that he was granted a downward departure under U.S.S.G. § 5K 1.1.

guilty plea was not established by the government beyond a reasonable doubt; and second, that the government must prove Harper's conduct establishing the obstruction of justice adjustment beyond a reasonable doubt before the district court may enhance Harper's sentence.

In this case, Harper entered into a valid plea agreement, pursuant to Fed. R. Crim P. 11, with the government. He stipulated in the factual basis accompanying his plea that he was responsible for 1108 pounds, or approximately 500 kilograms, of marijuana. He does not challenge this amount on appeal nor does he argue that the district court erred by receiving his guilty plea without a sufficient factual basis; instead, Harper argues that the district court should have made a factual finding that he was responsible for approximately 500 kilograms of marijuana beyond a reasonable doubt.

Harper misconstrues the import of *Apprendi*. *Apprendi* involved the question whether, pursuant to the Due Process Clause of the Fourteenth Amendment, a factual determination which gives rise to a penalty in excess of the prescribed statutory maximum must be made by a jury on the basis of proof beyond a reasonable doubt, or whether a judge may make the factual determination by a preponderance of the evidence. *Apprendi* pleaded guilty to three counts of a state indictment, two for second-degree possession of a firearm for an unlawful purpose and one for third-degree unlawful possession

of an antipersonnel bomb. *Apprendi*, 120 S. Ct. at 2352. The second-degree offenses were punishable by a sentence of between five and ten years' imprisonment. A separate statute, New Jersey's "hate crime" statute, authorized the trial judge to extend a defendant's term of imprisonment for a second-degree offense to between ten and twenty years if the judge found, by a preponderance of the evidence, that the defendant "acted with a purpose to intimidate an individual or group of individuals because of," inter alia, that individual's race. *Id.* at 2351. In the plea agreement, the state reserved the right to seek an enhanced sentence on one of the second-degree offenses pursuant to the hate crime statute; Apprendi reserved the right to contest the constitutionality of that statute's enhanced sentencing procedure.

At an evidentiary hearing held upon motion by the state, the trial court found by a preponderance of the evidence that Apprendi had unlawfully possessed a firearm with a purpose to intimidate on the basis of race, in violation of the state's hate crime statute. Thus, instead of facing a maximum ten-year sentence on a count to which he pleaded guilty, Apprendi received a twelve-year sentence pursuant to the hate crime statute's sentencing enhancement. Apprendi challenged this sentence as violative of his Fourteenth Amendment due process right to have all elements of a charged offense tried to a jury and proved beyond a reasonable doubt.

The Supreme Court agreed with Apprendi and found the New Jersey hate crime statute's enhanced penalty provision unconstitutional under the Sixth and Fourteenth Amendments. The Court concluded that the sentencing enhancement for hate crimes was an element of the offense, not a sentencing factor, and as such had to be established by more than a preponderance of the evidence. In striking down the sentencing enhancement, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 120 S. Ct. at 2362-63.

In this case, Harper stipulated that he was responsible for slightly more than 500 kilograms of marijuana and pleaded guilty, pursuant to that amount, to a count which carried a mandatory minimum sentence of ten years with a possible sentence of life imprisonment. The penalty provisions in 21 U.S.C. § 841 (b) provide for a range of penalties conditioned upon, inter alia, the amount of drugs for which the defendant is held accountable and the defendant's prior felony drug convictions. According to § 841(b)(1)(B), a defendant who is held accountable for 100 kilograms or more of marijuana and has a prior felony drug conviction must be sentenced to at least 10 years and not more than life in prison. Because Harper has a prior felony drug conviction and he stipulated to responsibility for approximately 500 kilograms of marijuana, which amount he does not now dispute, he was subject to the

mandatory minimum ten-year sentence.[5] Harper's sentence for a term of 168 months, or 14 wears, is, therefore, not in excess of the statutory maximum.[6]

Harper's *Apprendi* argument clearly would have merit if the indictment failed to charge him with conspiracy to distribute a specific quantity of drugs; if he subsequently pleaded guilty without stipulating, either in a plea or in a factual basis, to the amount of drugs for which he assumed responsibility; and if the district court had determined at sentencing, by a preponderance of the evidence, the amount of drugs attributable to Harper which subjected him to an enhanced statutory sentence. Likewise, Harper's claim would have merit if he had been indicted for a "measurable quantity" of marijuana, convicted by a jury for conspiracy to distribute this unspecified quantity, and then sentenced by the district court under a preponderance of the evidence standard in excess of the default statutory maximum In both instances, Harper's Fifth and Sixth Amendment rights would have been violated by the failure to give him proper notice of his

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5Harper does not challenge the use of his prior drug convictions as a sentencing factor. Of course, such a challenge would be unavailing. *United States v. Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000)(en banc).

6If we were to consider Garcia's *Apprendi* claim, we would note that Garcia also pleaded guilty and stipulated in a factual basis accompanying his plea to responsibility for approximately 1200 pounds of marijuana. J.A. at 137. Like Harper, his claim does not, therefore, appear to implicate *Apprendi*.

crime and the failure to charge and prove all elements of the crime, either to judge or jury, beyond a reasonable doubt. See *United States v. Ramirez*, - F.3d - , 2001 WL 137939, *3 (6th Cir. Feb. 16, 2001) (holding that when quantity of drugs for 21 U.S.C. § 841 (a) conviction determines statutory mandatory minimum or maximum sentence under § 841(b), jury should determine amount of drugs beyond a reasonable doubt); *United States v. Flowal*, 234 F.3d 932, 936 (6th Cir. 2000) (same).

Harper, however, stipulated to the amount of drugs for which he was held responsible, and the district court did not rely on any fact outside of the plea agreement to determine drug quantity at sentencing. Therefore, the principles articulated in *Apprendi* are not implicated by the instant case, and Harper's argument must fail.[7] Cf., *United States v. Munoz*, 233 F.3d 410, 414 (6th Cir. 2000) (upholding defendant's sentence for conspiracy to distribute cocaine and methamphetamine despite fact that defendant only pleaded guilty to conspiracy to distribute cocaine but not rnethamphetamine because

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[7]Similarly, Harper's argument with respect to the obstructive conduct enhancement increased Harper's base offense level from a 31 to a 33; this difference resulted in a sentencing range of between 168 to 210 months instead of a range of 135 to 168 months. Given the fact that Harper stipulated to the amount of drugs which were used to determine his statutory sentence, neither sentencing range is in excess of the applicable statutory maximum. Thus, *Apprendi* does not apply.

"sentence did not exceed the statutory maximum for the portion of the indictment to which [defendant] validly pled guilty").

## 111. CONCLUSION

For the foregoing reasons, we AFFIRM the defendants' sentences.

# APPENDIX B – JUDGMENT OF THE DISTRICT COURT DATED OCTOBER 25, 1999

*District Court Order of Judgment* – 10-25-99

United States District Court
Eastern District of Tennessee at Knoxville

(Filed October 25, 1999)
U. S. District Court – Eastern District, TN

United States of America
v.
David L. Harper

Judgment in a Criminal Case
(For offenses Committed On or after November 1, 1987)

Case Number: 3:99-CR00006-004

Aubrey L. Harper
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1 of the second superseding indictment
_____ Pleaded nolo contendere to count(s)____ which was accepted by the court.
_____ Was found guilty on count(s)____ after a plea of not guilty.

| **Title & Section** | **Nature of Offense** |
|---|---|
| 21 U.S.C. §846 | Conspiracy to distribute and possess with intent to district marijuana |

| **Date Offense Concluded** | **Count Number(s)** |
|---|---|
| 1/15/99 | 1ss |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_____ The defendant has been found not guilty on count(s) _____

__x__ Count(s) 2&3 of the second superseding indictment are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 414-72-8553
Defendant's Date of Birth: 03/11/1947
Defendant's USM No.: 16708-074

09/28/1999
Date of Imposition of Judgment

Defendant's residence address:
4912 17th Avenue
Chattanooga, Tennessee 37407

/s/ Curtis L. Collier
CURTIS L. COLLIER
U. S. DISTRICT JUDGE

Name & Title of Judicial Officer

Defendant's mailing address:
4912 17th Avenue
Chattanooga, Tennessee 37407 Date 10-25-99
Order Book 174 Page 105

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 168 month(s).

X The Court makes the following recommendations to the Bureau of Prisons:

**THAT THE DEFENDANT BE PLACED IN A COMPREHENSIVE DRUG TREATMENT PROGRAM**

X The defendant is remanded to the custody of the United States Marshal.

_____ The defendant shall surrender to the United States Marshal for this district:

____ at _____ a.m./p.m. on _____.

____ as notified by the United States Marshal.

_____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of

Prisons:

____ before 2:00 p.m. on _____

____ as notified by the United States Marshal.

____ as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

11/18/99 – Delto USP ATL. s/ C. Wood, LT

Defendant delivered on 12/20/1999 to FCI-Memphis At Memphis, TN, with a certified copy of this judgment.

s/ J.P. Young, Ward/EP
United States Marshal
for
By: s/ F. Portwood
Deputy U.S. Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

_____ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard

conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Page 4

**STANDARD CONDITIONS OF SUPERVISION**

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless

granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**SPECIAL CONDITIONS OF SUPERVISION**

**THAT DEFT SHALL PARTICIPATE IN A PROGRAM OF TESTING AND TREATMENT FOR DRUG AND/OR ALCHOL ABUSE, AS DIRECTED BY THE PROBATION OFFICER, UNTIL SUCH TIME AS THE DEFT IS RELEASED FROM THE PROGRAM BY THE PROBATION OFFICER.**

**SCHEDULE OF PAYMENTS**

Payments shall be applied in the following order: (1)

assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. _X_ in full immediately; or

B. $_____ immediately, balance due (in accordance with C, D, or E): or

C. ____ not later than _____; or

D. ____ in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U. S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E. ____ in _____ (e.g. equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments made toward any criminal monetary penalties imposed.

Special instructions regarding of criminal monetary penalties:

**THAT THE DEFT SHALL PAY THE ASSESSMENT IMPOSED IN ACCORDANCE WITH 18:3013.**

_____ The defendant shall pay the cost of prosecution.

_____ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

**STATEMENT OF REASONS**

X The court adopts the factual findings and guideline application in the presentence report.

**OR**

_____ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary);

**Guideline Range Determined by the Court:**

Total Offense Level: **33**
Criminal History Category: **III**
Imprisonment Range: **168 to 210 MONTHS**
Supervised Release Range: **8 to 8 YEARS**
Fine Range: **$17,500.00 to $4,000,000.00**

_____ Fine waived or below the guideline range

because of inability to pay.

Total Amount of Restitution: $_____

___ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3663(d).

___ For offences committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, an d113 A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a future under any reasonable schedule of payments.

____ Partial restitution is ordered for the following reason(s):

_____ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

**OR**

X The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

**TO REFLECT THE SERIOUSNESS OF CONDUCT, RESPECT FOR THE LAW, AND TO PROVIDE JUST PUNISHMENT AND ADEQUATE DETERRENCE.**

**OR**

_____ The sentence departs from the guideline range:

_____ Upon motion of the government, as a result of defendant's substantial assistance.

___ For the following specific reason(s):